UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

In a matter between:	)	
	)	
	)	
GENERAL MOTORS, LLC	)	
	)	
	)	Case Nos. 14-CA-197985
and	)	14-CA-208242
	)	
	)	
CHARLES ROBINSON,	)	
an individual.	)	
	)	
	)	
	)	

BRIEF OF *AMICUS*
NATIONAL NURSES UNITED

Responding to NLRB Invitation Set Forth at 368 NLRB No. 68 (September 5, 2019)

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I. INTRODUCTION

National Nurses United (NNU or Union) files this brief as *amicus* in response to the Board's Notice and Invitation to File Briefs in this case. NNU is a woman-of-color-led union that represents over 150,000 registered nurses from diverse backgrounds. NNU is opposed to all forms of subordination, including racism and sexism, and is steadfastly committed to advancing all workers' rights. As such, the Union is an interested party concerning issues raised in this case.

General Motors and Robinson involved a union committeeperson's profane and offensive workplace statements to his supervisors in the course of his union duties on three separate occasions. Relying on the balancing test articulated in *Atlantic Steel*, 245 NLRB 814, 816 (1979), the Administrative Law Judge held that employee Charles Robinson indeed lost the protection of the National Labor Relations Act (Act or NLRA) on two of these occasions for his remarks to management. The Administrative Law Judge's Decision (ALJD) is a conservative application of a conservative test, one that already offsets employees' Section 7 rights against employers' interest in maintaining order in the workplace.

In its Notice and Invitation to File Briefs, the Board signals its intent to revisit not only *Atlantic Steel*, but also precedent establishing loss-of-protection standards outside of the workplace. NNU echoes dissenting Member McFerran's sentiment that "the scope of the majority's inquiry reaches far beyond the issues presented in this case, and the majority has offered no good reason for revisiting long-settled law."[1]

[1] NNU also joins Member McFerran in condemning the Board's "unfortunate trend" of overreach in this and other cases, part of a broad effort to undermine worker protections and the goals of the Act. Notice and Invitation to File Briefs, pp. 4. See, also, Economic Policy Institute, Celine McNicholas, Margaret Poydock, and Lynn Rhinehart, Unprecedented: The Trump NLRB's attack on workers' rights, October 15, 2019, available at

NNU requests that the Board adhere to its well-established precedent in *Atlantic Steel*. While the Board can reverse prior decisions based on "change[d] circumstances" and to effectuate the policies of the Act, neither rationale for reversal is present here.[2] "The Board has…acknowledged that employees are allowed some leeway for impulsive behavior when engaged in protected activity, since '[the] protections Section 7 affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses.'"[3] The *Atlantic Steel* test does just that. For NNU members, as will be shown below, its underlying assumptions are as relevant today as they were 40 years ago. Moreover, the test enumerated in *Atlantic Steel* is consistent with the purpose of the Act: to promote workers' rights to organize, not employers' interests in decorum or civility.[4]

NNU urges that the Board leave cases establishing loss-of-protections standards outside of the workplace—at picket lines and on social media—undisturbed, as the facts of the instant case simply do not implicate these other settings and tests. To do otherwise would contravene the Administrative Procedure Act (APA).

Without condoning racist, sexist or otherwise oppressive speech or conduct, NNU disputes the Board's conjecture that *Atlantic Steel* conflicts with Title VII of the Civil Rights Act of 1964.

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https://www.epi.org/publication/unprecedented-the-trump-nlrbs-attack-on-workers-rights/; Bobbi Murray, "The Trump NLRB's Anti-Labor Day," The American Prospect, September 2, 2019, available at https://prospect.org/power/trump-nlrb-s-anti-labor-day/.

[2] *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 784, 88 S. Ct. 1344, 1369, 20 L. Ed. 2d 312 (1968); *Optical Workers' Union v. Nat'l Labor Relations Bd.*, 227 F.2d 687, 691 (5th Cir. 1955); *NLRB v Seven-Up Bottling Co.*, 344 US 344 (1953).

[3] *Gen. Motors LLC & Charles Robinson, an Individual*, No. JD-59-18, 2018 WL 4489341 (Sept. 18, 2018).

[4] See 29 U.S.C. § 151.

Additionally, NNU notes that the Board's Notice cites no cases applying *Atlantic Steel* to protect racist or sexist slurs in the context of an employee's outburst to her employer, and the NNU is aware of none. Indeed, the facts of *General Motors and Robinson* appear to involve racially-charged language by a member of a protected group, but no racial epithets directed towards members of protected groups. The Board's conflation of an employee from a subordinated social group accusing his employer of racism, however ungracefully, with conduct creating a hostile work environment under Title VII evinces a fundamental misunderstanding of the anti-subordination purpose and legal standards of Title VII, an Orwellian attempt to diminish worker protections under the pretext of combating bigotry, or both.

II. STATEMENT OF THE CASE

Respondent, General Motors, filed exceptions to the September 18, 2018 Administrative Law Judge's Decision (ALJD), which held that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act for suspending employee Charles Robinson for his profane outburst against a supervisor on April 11, 2017 while engaged in union activity. *Gen. Motors LLC & Charles Robinson, an Individual*, No. JD-59-18, 2018 WL 4489341 (Sept. 18, 2018). The ALJ found that General Motors did properly discipline Robinson for his conduct during two other meetings on April 25 and October 6, 2017 during which Robinson engaged in profane and offensive conduct, including the use of racially-charged language, in the course of protected activity. Id. In evaluating whether Robinson's conduct in these three meetings lost the protection of the Act, the ALJ applied the longstanding four-factor balancing test articulated in *Atlantic Steel* for determining whether an employee's outbursts to her supervisor in the course of otherwise protected activity lose the protection of the Act. Id.

III. ARGUMENT

A. The Board Should Adhere to *Atlantic Steel*, Which Effectuates the Policies of the Act and Already Balances Workers' Rights Against Employers' Interests.

The NLRA was enacted to effectuate "the policy of the United States" of "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[5][6] *Atlantic Steel* is consistent with this purpose. There, the Board articulated a balancing test for determining whether an employee's profane comments to his supervisor in the course of concerted protected activity lost the protection of the Act.[7] The Board weighs four factors in this calculus: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice."[8] [9]

This test acknowledges workers' human fallibility without requiring an employer to tolerate truly opprobrious conduct, balancing workers' rights with the employer's interest in maintaining order in the workplace. As one commentator urging the importation of the *Atlantic Steel* test to courts' evaluations of Title VII plaintiffs' alleged insubordination notes:

> The image of the worthy employee that arises under the NLRA encompasses a more active, emotional, and sometimes ribald or vulgar human being (but not one who is threatening or destructive). This NLRB image of the worthy worker arguably embodies a more realistic view of individuals contending with, and

[5] 29 U.S.C. § 151.
[6] The Act was not enacted to advance employers' interests in civility or decorum.
[7] *Atlantic Steel Co.*, 245 NLRB 814 (1979).
[8] Id., at 816.
[9] The majority asks whether prong three—the nature of the outburst—alone should be dispositive in determining that an employee's Section 7 activity forfeits the protection of the Act. NNU believes this position is untenable, where (1) the test would cease to be a balancing test, and (2) effectively any profane or obscene outburst could lose the protection of the Act, an irrational result that is contrary to the purpose of the Act and the test itself.

> sometimes reacting imperfectly and overly strongly to, the stress of workplace interactions related to the exercise of protected rights.
>
> To point this out is not to say, of course, that anything goes under the Board's precedents. To the contrary, employees found to have engaged in threatening behavior, or to have exceeded what a reasonable employer should tolerate by way of outbursts, swearing, harassment, or other inappropriate conduct, lose their Section 7 protection.[10]

Indeed, the Board found that the employee in the *Atlantic Steel* case lost the protection of the Act, where "the incident occurred on the production floor during working time (not at a grievance meeting), that the employee's question about overtime expressed legitimate concern which could be grieved, and that the supervisor had investigated and answered his question promptly; but, nevertheless, the employee had reacted in an obscene fashion without provocation and in a work setting where such conduct was not normally tolerated."[11] Similarly, the ALJD in the instant case found that Mr. Robinson's conduct lost the protection of the Act on two out of the three occasions. The *Atlantic Steel* test, while promoting the purposes of the Act, already offsets workers' rights with employer's interests in workplace order. No further limitation is warranted under the Act.

B. The Board Has Proffered no Evidence of Changed Circumstances Warranting Reversal of *Atlantic Steel*, and Indeed, Contemporary Workplace Realities Favor Retention of the *Atlantic Steel* Test.

Contemporary industrial realities favor retention of the *Atlantic Steel* test.[12] Workers are no less likely today than they were forty years ago to engage in profane or offensive outbursts in the course of discussing their terms and conditions of work. If anything, they may be more likely

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[10] Susan D. Carle, *Angry Employees: Revisiting Insubordination in Title VII Cases*, 10 Harv. L. & Pol'y Rev. 185, 220-21 (2016) (arguing for the importation of the *Atlantic Steel* test to courts' evaluation of alleged insubordination by Title VII plaintiffs).

[11] *Atlantic Steel Co.*, at 816–17.

[12] The Board's Notice and Invitation does not explicitly discuss changed circumstances warranting a departure from *Atlantic Steel*'s balancing test.

to do so due to increasing pressure from employers to do more with less, and a concomitant epidemic of stress and mental health concerns. Millions of American workers across industries "are working more hours, and more intensely, than ever," a direct result of employer decisions to maximize profit by understaffing workplaces.[13] The public health consequences are shocking: nearly half of all adult workers report that their jobs have a negative impact on their stress levels.[14]

In the health care industry, widespread understaffing and under-resourcing result in "less nurses doing more care for sicker patients."[15] Healthcare employers' policies and practices routinely force nurses, already tasked with high-stakes, life-and-death work, to carry ever increasing patient loads, work through meal and rest periods, and work off the clock.[16] As a result, nurses experience high rates of burnout, depression, and post-traumatic stress disorder.[17] Hospital-employed nurses experience depression at twice the rates of the general population, and nearly 1 in 5 of these nurses meets the diagnostic criteria for post-traumatic stress disorder (PTSD).[18] A staggering 86% of hospital nurses have symptoms of burnout.[19] PTSD, depression

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[13] Esther Kaplan, Americans are Working so Hard, It's Actually Killing People, The Nation (November 17, 2014), available at https://www.thenation.com/article/work-speedups-have-consequences-boss-never-imagined/.

[14] https://www.npr.org/documents/2016/jul/Workplace-Health-Poll.pdf

[15] Esther Kaplan, *Americans are Working so Hard, It's Actually Killing People*, The Nation (November 17, 2014), available at https://www.thenation.com/article/work-speedups-have-consequences-boss-never-imagined/.

[16] Id.

[17] Macphee, M., V. Dahinten, and F. Havaei, *The Impact of Heavy Perceived Nurse Workloads on Patient and Nurse Outcomes.* Administrative Sciences, 2017. **7**(1): p. 7.; Maguen, S., et al., *Routine Work Environment Stress and PTSD Symptoms in Police Officers.* The Journal of Nervous and Mental Disease, 2009. **197**(10): p. 754-760.

[18] Letvak, S., C. Ruhm, and T. McCoy, *Depression in Hospital-Employed Nurses.* Clinical Nurse Specialist, 2012. **26**(3): p. 177-82.; Mealer, M., et al., *The Prevalence and Impact of Post Traumatic Stress Disorder and Burnout Syndrome in Nurses.* Depression and Anxiety, 2009. **26**: p. 1118-26.

and chronic high stress are, in turn, associated with irritability and angry outbursts.[20] Nurses' and other workers' industrial realities require that the Board continue to permit some leeway for workers' strong responses in the course of protected activity.

C. *Atlantic Steel* Does Not Conflict with Title VII.

The Board speculates[21] that *Atlantic Steel* conflicts with Title VII of the Civil Rights Act of 1964.[22] It does not.

To establish a claim of a hostile work environment, an employee must prove that "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently

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[19] Id.

[20] See, e.g., National Institute for Mental Health, 5 Things You Should Know About Stress, *available at* https://www.nimh.nih.gov/health/publications/stress/index.shtml (last access October 29, 2019)(noting that "some people experience mainly digestive symptoms, while others may have headaches, sleeplessness, sadness, anger or irritability."); National Institute for Mental Health, Post-Traumatic Stress Disorder, *available at* https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml (last access October 29, 2019) (noting "angry outbursts" as a symptom of Post-Traumatic Stress Disorder); National Institute for Mental Health, Depression, *available at* https://www.nimh.nih.gov/health/topics/depression/index.shtml (last accessed October 29, 2019) (noting "irritability" as a symptom of depression).

[21] As noted earlier, the Board's Notice cites no cases applying *Atlantic Steel* to protect racist or sexist outbursts in the context of an employee's outburst to her employer, and there are none.

[22] Additionally, *General Motors and Robinson* does not appear to involve racist slurs directed towards members of a protected group, let alone a supervisee or a co-worker from a protected group, triggering Title VII liability. The case apparently involves "racially charged" language and insinuations of racism by Robinson, an African American man, against his supervisors. NNU believes it is immensely important to make this distinction—the power dynamics matter, and there is a difference between racist speech and racially-charged language. The Board itself has held that an employee's racially-charged language, including accusations of racism, in the course of protected activity do not inherently forfeit the protection of the Act. Indeed, racially-charged language is to be expected in an employee's complaint of racial discrimination, just as profanity might arise in the course of worker complaints regarding other terms and conditions of work. See, e.g., *Arthur Young & Co*., 291 NLRB 39, 44 (1988) (adopting the order of the Administrative Law Judge, who found that the alleged racial remarks at issue "simply were expressions of opinion among employees that minorities are given preferential treatment vis-a-vis promotions in the Document Processing Center because the supervisors also happened to be members of minority groups. Such an opinion expressed by employees (whether accurate) is directly related to terms and conditions of employment, and is not so offensive as to adversely affect company discipline.")

severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21 (1993). The employee must prove five elements if he bases his harassment claim on race: (1) that he is a member of a protected class; (2) that he was subjected to unwelcome racial harassment; (3) that the harassment was based on his race; (4) that the harassment was severe or pervasive enough to alter the terms and conditions of his employment and create a discriminatorily abusive working environment; and (5) that the employer is responsible for the environment under a theory of either vicarious or direct liability.[23] *Miller v. Kenworth of Dothan, Inc.,* 277 F.3d 1269, 1275 (11th Cir.2002).

"The employee must 'subjectively perceive' the harassment as sufficiently severe and pervasive to alter the terms or conditions of employment, ... [and] 'the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances.' " *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 81 (1998). Courts look to the totality of the circumstances to determine whether the environment is sufficiently hostile or abusive, "including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'" *Faragher v. City of Boca Raton,* 524 U.S. 775, 787–88, 118 S. Ct. 2275, 2283 (1998).

The bar to a viable hostile work environment claim is a high one: "'[the] standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility' code.' … [C]onduct must be extreme to amount to a change in the terms and conditions of employment…." *Faragher,* 524 U.S. at *788* (internal citations omitted). Indeed, one court

[23] Courts require analogous elements of proof for claims of hostile work environment discrimination on the basis of other protected traits, including sex.

construing Title VII noted that "[t]he workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins." *Suarez v. Pueblo Int'l, Inc.,* 229 F.3d 49, 54 (1st Cir.2000). Accordingly, "'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher*, 788 (1998).

A plaintiff is required to prove that the employer is responsible for the hostile work environment because of actions taken by either a supervisor or a coworker. *Miller,* 277 F.3d at 1278. For harassment by a coworker, the employer will be held directly liable under Title VII if it knew or should have known of the harassing conduct but failed to take prompt remedial action. *Faragher*, at 799; 29 CFR 160.11(d). "Examples of responses that have been deemed appropriate 'have often included prompt investigation of the allegations, proactive solicitations of complaints, […] reprimands, and warnings that future misconduct could result in progressive discipline.' " *Wilson v. Moulison N. Corp.,* 691 F.Supp.2d 232, 238 (D.Me.2010) (quoting *Adler v. Wal–Mart Stores, Inc.,* 144 F.3d 664, 675 (10th Cir.1998)).

The majority cites to case law holding that a single remark directed at an employee may create a hostile work environment under Title VII. However, it neglects to specify that the isolated incidents referenced in that case are the use of deeply offensive racial epithets—including the "N-word"—by *supervisors* in the presence of supervisees.[24] As one treatise notes, "*[b]ecause the employer cloaks a supervisor with authority over the victim*, even a single act by a supervisor may be severe enough to alter the conditions of employment. Thus, when a

[24] *Castleberry v. STI Grp.,* 863 F.3d 259, 264–65 (3d Cir. 2017).

supervisor makes a single racial slur, it exacerbates the severity of the remark and may create a hostile work environment."[25]

Atlantic Steel applies to situations with the inverse power dynamic—that of a subordinate's outbursts to a supervisor.[26] A subordinate's single use of a slur against a supervisor from a protected group in the course of protected concerted activity—*a fact pattern that is not present in the instant case, and has apparently never been before the Board*—would likely not create a hostile workplace under Title VII. In any case, an employer could comply with its obligations under the law by promptly counseling the offending employee instead of disciplining her.[27]

If an employee utters racist epithets in the course of otherwise protected activity in the presence of her co-workers, in addition to a supervisor, an application of the *Atlantic Steel* test could actually lead to the employee's conduct losing the protection of the Act, where both the nature of the outburst and the place of the discussion prongs mitigate against protection. In any case, Title VII requires only that an employer address co-worker harassment by taking prompt remedial action, which the employer could achieve by counseling and without disciplining the offending employee.

Not only is *Atlantic Steel* not in conflict with the federal anti-discrimination statute, there is support for the proposition that robust protections for employees' Section 7 activity promote

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[25] Rutter Group Practice Guide: Federal Employment Litigation, 5:271 (emphasis added).
[26] *Three d, LLC*, 361 NLRB 308, 311 (2014) ("Typically, the Board has applied the *Atlantic Steel* factors to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act.").
[27] Manuel Quinto-Pozos, *The Tension Between the NLRA, the EEOC, and Other Federal and State Employment Laws: The Union Perspective*, 33 ABA J. Lab. & Emp. L. 277, 289–90 (2018).; *See, e.g., Wilson v. Moulison N. Corp.*, 691 F.Supp.2d 232, 238 (D.Me.2010) (quoting *Adler v. Wal–Mart Stores, Inc.*, 144 F.3d 664, 675 (10th Cir.1998)).

the policies of Title VII.[28] For instance, unionization—and the attendant opportunity to air grievances and engage in concerted activity—correlates to significant reductions in economic disparities based on race, gender, and immigration status.[29] In California, unionization reduced these disparities by increasing wages by 26 percent for women, 19 percent for black workers, 40 percent for Latinx workers, and 19 percent for immigrant workers—all larger wage increases than those experienced by unionized men, white workers, and U.S.-born workers, respectively. Id. Nationwide, "[u]nionized women earn, on average, 13 percent […] more than similar non-union women. The large union wage advantage holds for women across all education levels and even in typically low-wage occupations…."[30] Similarly, national "data show that the racial wealth gap is smaller among union members than among nonunion members," and "suggest that nonwhite union members receive a particular boost in their wealth because they see larger increases in pay, benefits, and employment stability than white union members."[31]

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[28] "Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life. The Legislative Histories of title VII, the Equal Pay Act, and the Equal Employment Opportunity Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and the consequent lower income levels of minorities and women." 29 CFR 1608.1(b).

[29] See, e.g., UC Berkeley Center for Labor Research and Education Research Brief, The Union Effect in California: Gains for Women, Workers of Color and Immigrants, available at http://laborcenter.berkeley.edu/union-effect-in-california-2/.

[30] Janelle Jones, John Scmitt, and Nicole Woo, Women, Working Families, and Unions, Center for Economic and Policy Research, available at http://cepr.net/documents/women-union-2014-06.pdf, pp. 3.

[31] Christian E. Weller and David Madland, Union Membership Narrows the Racial Wealth Gap for Families of Color, The Center for American Progress, available at https://www.americanprogress.org/issues/economy/reports/2018/09/04/454781/union-membership-narrows-racial-wealth-gap-families-color/.

D. The Board's Attempt the Make Determinations on Factual Issues Not Present in this Case Violates the APA, and the Board's Existing Standards On Those Issues Do Not Conflict with Title VII.

1. The Board May Not Make Determinations on Issues Not Presented

In its Notice and Invitation to File Briefs ("Notice"), the Board majority indicates a willingness to overrule longstanding precedent applicable to three factual scenarios not present in the instant case. Despite the ALJ's decision having made no factfinding relating to social media posts, offensive statements of a sexual nature, or picket line conduct, the Board majority now solicits the parties' and amici's positions on what standards should apply to these factual scenarios. The Board's use of this case as a vehicle to change loss-of-protection standards in these contexts violates the Administrative Procedure Act (APA).

The Board's actions are governed by the Administrative Procedures Act ("APA"), 5 USC §500 et seq., which "establishes a scheme of reasoned decisionmaking." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998). An agency's actions must lead to a result that is within the scope of its legal authority, through a logical and rational process. *Id.* The Board may take action through either rulemaking or adjudication and the choice between these two processes is within the Board's discretion, but the Board's discretion on this issue is not without limits: "there may be situations where the Board's reliance on adjudication would amount to abuse of discretion of a violation of the Act." *NLRB v. Bell Aerospace Co. Div. of Textron, Inc.*, 416 U.S. 267, 294 (1974). This is such a situation.

Any action in this case that would change established rules governing picket-line conduct, social media posts, or offensive comments of a sexual nature would amount to abuse of discretion, since those issues are not before it in the instant case. The Board cannot, through adjudication, make a determination on issues for which interested parties have not been "timely

informed of…the matters of fact and law asserted." 5 USC §554(b), and "the time for giving notice of matters and fact and law to be asserted is prior to the hearing." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861 (2d Cir. 1966). The Board's introduction of new issues in the Notice does not constitute timely notice, and the Board cannot make any determination on those issues without exceeding the scope of its authority: "We hold that the Board cannot establish its attempted rule by an adjudication of a matter not in issue before it. In the absence of the statutory notice of 'the matters of fact and law asserted' the Board lacked power to pass upon any such issue as that now tardily argued in its briefs." *NLRB v. E & B Brewing Co.*, 276 F.2d 594, 599 (6th Cir. 1960). By raising the issues of picket-line conduct, offensive comments of a sexual nature, and social-media postings for the first time in its Notice, the Board has deprived interested parties of the opportunity for the evidentiary hearing required before new rules can be established through adjudication.

2. The Board's Existing Standards on Picket-Line and Social Media Conduct Do Not Violate Title VII

Even if *General Motors and Robinson* did implicate workers' picket line and social media conduct, which it does not, an analysis of several Title VII picket line and social media harassment cases illustrates that conduct that may be protected by the NLRA in these settings does not create Title VII hostile work environment liability for employers as the majority suggests.

As a threshold matter, there is split authority as to whether Title VII even applies to harassing conduct beyond the workplace. Both the statute itself and the Supreme Court are silent on this issue. The U.S. Department of Labor's regulations on Title VII specifically address employers' responsibility for "maintain[ing] *a work environment* free of harassment on [the basis of protected traits]" and their liability for harassment "*in the workplace*." See, e.g., 29 C.F.R. §§

1604.11(d)-(e), 1606.8(a)-(b) (emphasis added). Lower courts are divided on whether extra-worksite harassment can be actionable under Title VII.

"[C]ourts have held that generally an employer is not liable for the harassment or other unlawful conduct perpetrated by a non-supervisory employee after work hours and away from the workplace setting." *Duggins ex rel. Duggins v. Steak'N Shake, Inc.*, 3 F. App'x 302, 311 (6th Cir. 2001). Some courts decline to consider evidence of harassment occurring outside of the worksite in hostile work environment cases.[32] When courts have considered extra-worksite incidents in such cases, they have largely done so on the grounds that "off-premises events such as meetings, business trips, and employer-sponsored social events can be considered under the totality of the circumstances because these settings can properly be characterized as an extension of the employee's work environment."[33]

Although some courts have acknowledged that harassment on the picket line, while technically outside of the workplace, may be actionable under Title VII, their holdings are consistent with the Board's *Clear Pine Mouldings'* proscription on threats and acts of violence and acknowledgment of the unique context of the picket line.[34] In *Dowd v. United Steelworkers of America, Local No. 286*, the court found that a reasonable jury could have found that the picket line harassment of African American plaintiffs was tantamount to a hostile work environment, where "[t]he plaintiffs were subjected to racial slurs and *threats of physical*

[32] See, e.g., *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510-11 (5th Cir. 2003), cert. denied, 540 U.S. 815 ; *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997).
[33] Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 Wash. L. Rev. 249, 269 (2012).
[34] *Clear Pine Mouldings*, 268 NLRB 1044, 1046 (1984), enfd. 765 F.2d 148 (9th Cir. 1985), cert. denied 474 U.S. 1105 (1986); *Dowd v. United Steelworkers of Am., Local No. 286*, 253 F.3d 1093 (8th Cir. 2001); *Parson v. Local 1, UNITE HERE, AFL-CIO*, No. 04 C 3991, 2006 WL 1430554, at *4 (N.D. Ill. May 17, 2006).

violence each time they drove into and out of the plant [over the course of a three-week strike]. There was evidence that the picketers *threw tacks down in the pathway of the plaintiffs' cars and spat on their car windows*. In addition, there was evidence that the plaintiffs were fearful for their personal safety." *Dowd v. United Steelworkers of Am., Local No. 286*, 253 F.3d 1093, 1096, 1102 (8th Cir. 2001) (emphases added).

Conversely, in *Parson v. Local 1, UNITE HERE, AFL-CIO*, the court found that picket line harassment on the basis of race and sexuality did not constitute a hostile work environment, even where the plaintiff was subjected to upwards of five to eight offensive racial or sexual remarks a day on days that two particular strikers were present. Notably, like the Board itself, the court acknowledged the unique context of the picket line, evaluating the alleged harassment "[i]n light of the level of antagonism that otherwise existed in plaintiff's job during the pertinent time period":

> The undisputed evidence is that, *in crossing a picket line*, plaintiff was being subjected to much antagonism from the picketing Union members, including numerous insults and taunts. […] The additional comments [based on protected traits] were not particularly frequent in that plaintiff was otherwise subjected to a greater number of nonracial and nonsexual taunts each day. *There were no physical assaults or threats. There is no evidence that the additional remarks made plaintiff's ability to perform his duties significantly more difficult than they already were with the strike going on.* As plaintiff himself testified, *his job duties required that he repeatedly cross the picket line* and customers were also being taunted as scabs as were other employees working in the area of the picketline. The court does not condone the conduct that allegedly occurred, but the evidence does not support that it rose to the level of a hostile work environment.

Parson v. Local 1, UNITE HERE, AFL-CIO, No. 04 C 3991, 2006 WL 1430554, at *4 (N.D. Ill. May 17, 2006) (emphases added).

Just as Title VII picket line cases square with Board precedent, a sampling of Title VII cases on social media harassment belies no inherent conflict between the statute and the Board's totality of circumstances test articulated in *Pier Sixty, LLC*.

In *Chinery v. American Airlines*, the court found that plaintiff's co-workers' and fellow union members' conduct in posting eight derogatory Facebook comments about the plaintiff over an informal Facebook group for American Airlines flight attendants in the course of plaintiff's bid for union office did not create a gender-based hostile working environment. *Chinery v. Am. Airlines*, 778 F. App'x 142, 146 (3d Cir. 2019). The Facebook comments included crude references to and a picture of female genitalia, gendered insults (e.g., "cavalier harpies," "shrews of misinformation," "basic b*tches") toward plaintiff and her faction of supporters, derogatory remarks about plaintiff's physical appearance, and considerable profanity. Id., 143-144. The court found that despite being offensive, the Facebook posts were nonetheless "only 'offhand comments[ ] and isolated incidents' that are insufficiently extreme to amount to an objective change in the terms and conditions of employment." *Id.*, at 146.

In another case on point, an employee sued her employer for a racially hostile work environment, in part, because a co-worker posted a racially derogatory comment on a photograph of the plaintiff taken at a company golf outing and posted by another co-worker on a personal Facebook page. *Amira-Jabbar v. Travel Servs., Inc.*, 726 F. Supp. 2d 77, 80 (D.P.R. 2010). Similarly, the court found that the co-worker harassment incidents alleged were insufficient to create an abusive environment, and that, in any case, the employer had taken 'prompt and appropriate" action to address the alleged social media harassment when it "block[ed] access to [Facebook] for all office computers." *Id.*, at 87.

Even if Title VII does apply to an employee's extra-worksite conduct, the "severe or pervasive" requirement for a viable hostile work environment claim and the appropriate remedial measures required of the employer (see, supra, Section III) remain the same. That is to say, a single remark by an employee to a supervisor or a co-worker either at the strike line or online is

unlikely to create a hostile work environment on its own, and the employer could easily take appropriate remedial action without disciplining the employee engaged in otherwise protected concerted activity in potential violation of the Act.

IV. CONCLUSION

The NNU respectfully requests that the Board adhere to its *Atlantic Steel* loss-of-protection standard for employees' workplace outbursts to employers in the course of otherwise protected activity. As shown above, the Board shows no changed circumstances to support reversal, and *Atlantic Steel* continues to effectuate the policies of the Act. Additionally, the NNU requests that the Board leave precedent establishing loss-of-protection standards in the online and picket line contexts undisturbed, where the facts of General Motors and Robinson do not implicate these settings. Finally, NNU reiterates that Title VII hostile work environment principles and Board loss-of-protection standards do not conflict, and the civil rights statute is not "a general civility code" requiring a sweeping change in the Board's approach to determining when employee conduct loses the protection of the Act.

DATED: November 12, 2019

Respectfully submitted,

NATIONAL NURSES UNITED (NNU)
LEGAL DEPARTMENT

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Proof of Service

The undersigned hereby declares under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, not a party to the within action, and that my business address is 155 Grand Avenue, Oakland, California 94612.

On the date below, I served the following document:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 12, 2019, at Oakland, California.

/s/ Robert Craven
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